

IN THE SUPREME COURT OF THE STATE OF DELAWARE

HERBERT AIKEN,	§	
	§	No. 140, 2011
Defendant Below,	§	
Appellant,	§	Court Below—Superior Court of
	§	the State of Delaware in and for
v.	§	Sussex County
	§	
STATE OF DELAWARE,	§	
	§	Cr. ID Nos. 0708018692
Plaintiff Below,	§	0709036499
Appellee.	§	

Submitted: June 27, 2011

Decided: September 19, 2011

Before **BERGER, JACOBS** and **RIDGELY**, Justices.

O R D E R

This 19th day of September 2011, upon consideration of the opening brief filed by the appellant, Herbert Aiken, and the motion to affirm filed by the appellee, State of Delaware, it appears to the Court that:

(1) On February 19, 2008, Herbert Aiken pled guilty in the Superior Court to five criminal offenses and was sentenced to a total of nine and one-half years at Level V suspended after eighteen months for six months at Level IV home confinement followed by Level III probation and Level I supervision restitution only. Thereafter, on September 18, 2009, January 8, 2010, and September 17, 2010, Aiken was found in violation of

probation (VOP) and was resentenced. Aiken did not appeal his guilty plea and sentence or any of the VOP convictions and sentences.

(2) This appeal is from the Superior Court's March 15, 2011 denial of Aiken's request for a modification of sentence. Aiken devotes most of his opening and supplemental opening briefs, however, to substantive claims arising from the February 19, 2008 guilty plea/sentencing and September 17, 2010 VOP conviction/sentencing.¹

(3) Aiken's claims arising from the February 19, 2008 guilty plea/sentencing and September 17, 2010 VOP conviction/sentencing are not justiciable in this appeal from the March 15, 2011 denial of Aiken's request for a modification of sentence.² Aiken did not exercise his right to appeal from either the February 19, 2008 guilty plea/sentencing or the September 17, 2010 VOP conviction/sentencing. Aiken may not use this appeal from the Superior Court's March 15, 2011 denial of a sentence modification to

¹ For instance, Aiken claims that he is not guilty of the offenses to which he pled guilty on February 19, 2008, that his defense counsel was ineffective at the September 17, 2010 VOP hearing, that his probation officer lied under oath at the same VOP hearing, that his right of due process was violated at the VOP hearing, and that the September 17, 2010 VOP sentence constituted cruel and unusual punishment.

²See, e.g., *Sewell v. State*, 2003 WL 22839962 (Del. Supr.) (concluding that right to counsel claim at 2001 VOP hearing not justiciable in appeal from denial of 2003 sentence modification motion).

resurrect alleged claims of error that could have been, but were not, timely raised in a prior appeal.³

(4) The State has moved to affirm the Superior Court's judgment on the ground that it is manifest on the face of Aiken's opening and supplemental opening briefs that the appeal is without merit.⁴ We agree and affirm. This Court reviews the Superior Court's denial of a modification of sentence for an abuse of discretion.⁵ In this case, the Superior Court's March 15, 2011 conclusion that "the [September 17, 2010 VOP] sentence imposed is reasonable and appropriate" was not an abuse of discretion.

NOW, THEREFORE, IT IS ORDERED that the State's motion to affirm is GRANTED. The judgment of the Superior Court is AFFIRMED.

BY THE COURT:

/s/ Jack B. Jacobs
Justice

³ See *Strawley v. State*, 2002 WL 86687 (Del. Supr.) (citing *Carr v. State*, 554 A.2d 778 (Del. 1989)).

⁴ Del. Supr. Ct. R. 25(a).

⁵ *Hickman v. State*, 2003 WL 22669335 (Del. Supr.) (citing *Shy v. State*, 246 A.2d 926, 927 (Del. 1968)).